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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)
)
Amendment of Part 90 of the)
Commission's Rules to Adopt)
Regulations for Automatic Vehicle)
Monitoring Systems)

PR Docket No. 93-61

To the Commission:

REPLY COMMENTS OF COMTRAK

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November 20, 1997

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To the Commission:

REPLY COMMENTS

Comtrak, by its attorneys and pursuant to § 1.415 and 1.419¹ of the Federal Communications Commission's (the "FCC" or "Commission") rules, hereby submits its Reply Comments in response to comments filed with reference to the above-entitled Further Notice of Proposed Rulemaking (the "*Notice*").² Comtrak participated in the initial stage of this rulemaking by filing comments that addressed the FCC's proposed rules for allocating multilateration location and monitoring services ("LMS") spectrum.

I. Comtrak Supports Teletrac's Proposal That The FCC Use The Same Kind Of Auction Design That It Has Successfully Used In The Past

For all the reasons set forth by Teletrac and Comtrak in their comments, Comtrak agrees that the FCC should follow an auction methodology that is consistent with past auction practices – namely a simultaneous multiple round bidding method. Simultaneous multiple round bidding is cost effective and provides auction participants the time and information

¹ 47 C.F.R. §§ 1.415 & 1.419.

² *Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, PR Docket No. 93-61 (released Sept. 16, 1997).

necessary to develop and implement their auction strategies.³ The FCC, therefore, should adopt this methodology in the LMS auction.

Comtrak, therefore, agrees with Teletrac that the FCC should avoid using a combinatorial bidding system.⁴ Combinatorial bidding is a system that is most effective in instances where auction participants run the risk of securing licenses for certain markets that are not desirable absent winning licenses for other areas. In essence, combinatorial bidding allows parties to pursue an "all or nothing" auction strategy whereby the participant can avoid purchasing spectrum if securing the right combination of licenses is not possible. Due to the nature of the LMS market, it is not likely that the level of complexity that suggests a need for combinatorial bidding will be present in the LMS auction.

II. The FCC Should Not Set Reserve Or Minimum Bids In The LMS Auction

The 1997 Budget Act requires that the FCC establish a reserve price that will serve as the minimum price for which a given license can be obtained through auctions.⁵ However, Congress provided the FCC with discretion to forego this requirement when dictated by the public interest.⁶ Comtrak believes that the public interest will not be served if the FCC establishes reserve bids in the LMS auction.

The primary reason for Comtrak's position is that it will be very difficult, if not impossible, for the FCC to establish a reserve bid level that will accurately reflect the market's initial valuation of the spectrum for any given LMS license area or frequency block. While the FCC may argue that it can later adjust the minimum bid levels, Teletrac aptly describes the problems that can stem from the Commission's reliance on this safeguard.⁷ Comtrak does not

³ *Id.*

⁴ Teletrac Comments at Section I.A.

⁵ 47 U.S.C. § 309(j)(1) as amended by The Balanced Budget Act of 1997, Pub. L. No. 105-33, § 3002(a)(1)(F); 11 Stat. 251 (1997) (codified as amended at 47 U.S.C. § 309(j)(4)(F).

⁶ *Id.*

⁷ Teletrac Comments at Section I.B.

wish to be placed in a position of losing the use of a critical strategic auction tool – namely its waivers – to alert the Commission to the fact that it has adopted reserve prices that are too high. The Commission can avoid this unfortunate event by following the suggestion of Teletrac and Comtrak that reserve prices should not be used in the LMS auction.

III. The FCC Must Fairly Define And Apply The Construction Requirements Established For LMS

Comtrak believes that it is critical for all LMS licensees to conform with the FCC's rules. However, Comtrak suggests that Teletrac may be overstating the need for the FCC to assert its authority to rigorously enforce the construction deadlines applicable to LMS. There is no evidence that rule waivers will be required any more frequently for LMS licensees than are required for other services. As a result, the FCC should continue to apply its rules to LMS as it has done in the past -- in an even-handed yet flexible manner.

A. The Development Of The LMS Industry May Require That Parties, Including Teletrac, Receive Rule Waivers

The overarching goal of the upcoming LMS auctions is to provide the public with a much needed, high quality, cost-effective LMS offering. As with any business, LMS system operators cannot predict or control all of the events that can cause such operators to pursue changes to their business plans. In order to foster the deployment of LMS throughout the United States, the FCC must continue to exercise the same level of flexibility that it has exercised toward entities that have secured LMS licenses outside of auctions.

For example, Teletrac has filed for a series of rule waivers that it believed were necessary to allow it to successfully deploy its own LMS systems. The same has been true for other LMS licensees. The FCC has taken a balanced approach to such requests. The Commission has granted waiver requests when it thought that the public interest would be served. This same balanced approach is required for responding to rule waiver requests filed by LMS auction winners. The unique circumstances of each request must be considered

individually. The FCC, therefore, should reject Teletrac's invitation to identify a list of circumstances that will result automatically in the denial of a waiver request.

B. Teletrac's Proposal Regarding Rule Waivers Will Be Particularly Burdensome On Small Businesses

Teletrac seems to be concerned that auction participants will secure spectrum with no intention of actually building LMS systems.⁸ Instead, such entities will use their licenses to extract "ransom" from entities that require such spectrum. Comtrak understands that a speculator's market has been established whereby parties secure spectrum at a low price via auction with the intent of later selling their licenses at a profit. While it is possible that this could happen, there is little likelihood that Teletrac, Comtrak and other serious auction participants will not have the ability to overcome such an occurrence during and after the LMS auction.

First, speculators are looking to secure spectrum at a low cost. If an entity such as Teletrac or Comtrak really wants a particular license, it can simply bid a higher price and drive the speculator out of the market.

Second, if a party is a speculator, the FCC can and should enforce its construction deadlines without hesitation. However, this circumstance differs substantially from one where it is evident that the licensee has a legitimate intent to offer LMS, but has encountered an unexpected problem that must be resolved before construction can be completed. For example, the FCC knows that Teletrac is interested in the wide deployment of LMS. It would be unfortunate for Teletrac to be forced to lose a license for which it paid a high auction price

⁸ Teletrac makes reference to the fact that the FCC must prevent spectrum warehousing. Teletrac Comments at 10. To the extent that Teletrac is referring to parties that hold their license, without any intention of offering service, while waiting for the value of the licenses to increase, Comtrak agrees that this practice is abhorrent and should be discouraged. However, Comtrak is certain that Teletrac is not referring to the distinguishable circumstances characterizing its own ten-year delay in constructing systems under the approximately 100 LMS licenses it has held. Nobody would accuse Teletrac of warehousing and the LMS industry has certainly benefited from the flexibility that the FCC has given Teletrac to ultimately construct its systems and come into full compliance with the law.

simply because a municipality enforces a zoning law in a manner that causes Teletrac to have to change its business plan. While such a circumstance is considered by Teletrac to be within a licensee's control and not worthy of a rule waiver,⁹ Comtrak has difficulty seeing how a committed entity like Teletrac should not be given some flexibility to identify an alternative strategy without losing its license. Comtrak is also unsure how the public would benefit from such a rigid application of the FCC rules once competition exists in the LMS market.

Finally, the FCC must be careful about creating any further churn in the LMS market. While LMS has been in existence for several years, the industry has not been given the opportunity to grow unencumbered. For example, many licensees, including Teletrac, would have liked to develop a viable LMS business, but the lack of finality in the FCC's LMS rules and the continual delay in the processing of new LMS applications has slowed the development of the industry. By auctioning spectrum, the FCC has the opportunity of allowing the LMS industry to grow at a time when the market is ripe for development. It would be tragic for this potential to be left unrealized because the FCC will not give licensees the most expansive ability to deploy their LMS systems. However, this will be the exact result if the FCC does not exercise its authority to grant rule waivers and to otherwise apply its regulations in a manner that facilitates business development, especially towards small business entities.

Unrealistic enforcement of the FCC rules will have a disproportionate burden on small businesses. Small businesses do not have access to the same amount of capital as large businesses. This fact is evident from the FCC's recent struggle over how to resolve the financial challenges facing certain PCS licensees. While small businesses have the technology, desire and ability to deploy nationwide LMS systems, financial constraints may require that such businesses deploy their systems in stages over a two or three year period instead of the one year period required under the FCC's rules. Without being able to rely on the FCC to grant waivers in the face of unique circumstances, small businesses may be faced with the Hobson's choice of losing their licenses because they have failed to construct or with losing

⁹ Teletrac Comments at 13-14.

their business because they are bankrupt. Finally, small businesses may be forced to reconsider their participation in the LMS auction if the FCC adopts the position that it will rigorously enforce its LMS rules without consideration of the totality of the circumstances presented in a waiver request. The public loses unnecessarily in all instances.

C. The FCC Should Modifying Its Construction Deadline In General Or As Applied To Small Business Entities

The FCC has solicited requests on how it can foster small business participation in the LMS auctions and industry.¹⁰ Comtrak believes that, in addition to its other recommendations, the FCC should follow past precedent and adopt a construction deadline that, at a minimum, would apply to all LMS licensees authorized to deploy service in economic areas ("EA"). In the alternative, Comtrak believes that the FCC should adopt a construction deadline for small businesses that reflects the realities associated with financing the purchase of LMS spectrum and the deployment of service in each license area. In either case, Comtrak recommends that the Commission follow the construction schedule it adopted for the 220 MHz land mobile and paging system licensees and allow LMS licensees to satisfy their construction requirements if they provide coverage to one-third of the EA's population within five years of initial license grant and two-thirds of the population within ten years.¹¹

Comtrak believes that the Commission must have erred when, in Appendix D of the *Notice*, it noted a modification to § 90.155 that required construction of LMS systems authorized for an EA to be constructed within one year of the license grant date.¹² While

¹⁰ *Notice* ¶ 75.

¹¹ *In the Matter of Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by Private Land Mobile Services*, PR Docket No. 89-552, *Third Report and Order*, ¶ 163 (released Mar. 12, 1997). The Commission has adopted longer construction periods for other EA licensed services, as well. *See, e.g., In the Matter of Amendment of Part 90 of the Commission's Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band*, PR Docket No. 93-144, *Second Report and Order*, ¶ 32-35 (released July 10, 1997) (citing *800 MHz Report and Order*, 11 FCC Rcd 1463, 1521 (1995))

¹² *Notice* Appendix D.

Comtrak believes the one year construction period was reasonable for site-licensed systems, it believes that same deadline should not apply to EA licenses. Indeed, as the Commission, itself, has stated, “[W]e have adopted longer construction periods which benefit all licensees, both large and small. We have also adopted and made proposals to adopt flexible construction requirements in other wireless services.”¹³ The Commission should not depart from this construction deadline precedent for purposes of LMS EA licensees.

Construction requirements have a direct impact on the level of competition and diversity in the telecommunications industry in general, and the LMS industry in particular. Because of the larger service area, unless an auction winner were an incumbent LMS provider, it would be almost impossible for such a winner to meet the one year deadline for more than a few EAs without the task of raising a large amount of initial capital. As a result, the Commission’s current rule will have the effect of favoring incumbents and reducing new entry, competition and innovation in direct contravention of the Commission’s overarching policy goals.¹⁴ Comtrak, therefore, asks the Commission to review § 90.155 in Appendix D to ensure that the change in language was intended.

Assuming, *arguendo*, that the Commission believes that the one-year period is correct, Comtrak requests that an alternative construction requirement be applied to small businesses in accordance with the congressional mandate under § 257 of the Telecommunications Act of 1996 (the “1996 Act”). Section 257 of the 1996 Act requires that the FCC identify and eliminate “market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services.”¹⁵ The Commission

¹³ *In the Matter of Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses*, GN Docket No. 96-113, *Report*, ¶ 120 (released May 8, 1997) (referencing construction periods adopted and/or proposed for SMR, 220 MHz land mobile and paging, MAS, WCS, and LMDS) (the “*Small Business Order*”).

¹⁴ *See, e.g., Small Business Order* ¶ 2.

¹⁵ 47 U.S.C. § 257.

has declared its “strong commitment” to adopting rules that advance telecommunications opportunities for small business, including the adoption of longer construction periods.¹⁶

The ideal business strategy for a small business is to construct a portion of its systems in an effort to establish a revenue stream. Once assets have been deployed and have begun generating revenues, small businesses gain a much greater ability to secure financing from banks or the public market. In addition, the cost of such financing is usually reduced. The small business then uses this new source of financing for completing its system deployment. This two-tiered approach would be very difficult for small businesses to implement in one year. A well-organized and aggressive small business could adopt this business approach following the 220 MHz five and ten year benchmarks.

Comtrak understands that the FCC has a desire to ensure that auction winners are serious about implementing their LMS systems. However, the FCC must also take into account that the LMS industry is not as mature as the 220 MHz industry, thus justifying a construction period that is at least as long as that applied to 220 MHz licenses. In addition, the short construction period will certainly reduce the price parties are willing to pay for such EA licenses. Consequently, the construction periods suggested by Comtrak offer a compromise between the needs of small businesses and the goals of the FCC. Comtrak, therefore, urges the FCC to follow the construction precedent established in the 220 MHz proceedings.

IV. The FCC Should Establish Clear Guidelines For Determining Whether A Potential Auction Participant Is Qualified To Take Advantage Of The LMS Small Business Incentives Proposed By Comtrak

As it has previously stated, Comtrak has reviewed the FCC’s definition of an “affiliate” in past FCC auction orders and has found the definition to be unclear. Comtrak, therefore, urges the Commission to establish a clear definition of what constitutes an “affiliate” and “control.” However, Comtrak believes that Teletrac’s suggestion that the FCC pre-certify

¹⁶ *Small Business Order* ¶ 2 & 120.

parties as small businesses will result in a waste of Commission resources and will unnecessarily delay the allocation of LMS spectrum.¹⁷

All auction participants must be given adequate information to determine whether they are qualified to take advantage of the FCC's small business incentives. Consequently, the FCC should use its past experience to adopt rules in this proceeding that anticipate the ownership scenarios that will cause an entity not to be classified as a small business. The FCC staff also should continue to make itself available, as it has in the past, to answer ownership questions. However, auction applicants should not be allowed to submit an application and have the FCC rule on its small business qualifications. Teletrac's proposal will cause an already taxed auction staff to unnecessarily divert resources to pre-certifying applications.¹⁸

Finally, an auction applicant should not be allowed to delay the LMS auction while it submits a series of modified ownership proposals to the FCC so as to learn what adjustments it must make to its ownership structure in order to become a small business. If the FCC adopts clear ownership rules, parties will have adequate information to structure their business to allow them to take advantage of the small business incentives. There is no reason to believe that any period of time is required or appropriate to allow parties to modify their ownership structure. In light of the above, Comtrak urges the Commission to reject Teletrac's proposals.

V. Comtrak Reiterates Its Position That The Commission Must Initiate LMS Spectrum Auctions No Later Than Second Quarter 1998

In his July 20, 1997 letter to Senator Ashcroft (R-MO), Chairman Hundt stated that the Commission intends to hold the LMS auctions by second quarter 1998. Comtrak continues to move forward in implementing its business plan so as to be prepared to participate in an auction by such a date. As there is no apparent reason that would justify further delay, it is

¹⁷ Teletrac Comments at Section II.

¹⁸ Of course, Comtrak is not suggesting that the FCC cannot institute its own review. Comtrak is simply suggesting that the pre-certification of all small business applications is unnecessary. If a party has made an error in its status, the FCC has adequate procedures for correcting the mistake after the LMS auction has concluded.

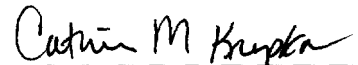
imperative that the new Chairman and his fellow Commissioners honor the commitment made by Chairman Hundt and , if possible, hold the LMS auctions by April 1998.

VI. Conclusion

Comtrak suggests that the recommendations presented in these Reply Comments are consistent with Congress's goals regarding the allocation of spectrum. Its recommendations will also ensure the positive treatment of small businesses mandated in the 1996 Act.

WHEREFORE, THE PREMISES CONSIDERED, Comtrak respectfully requests that the Commission act upon the LMS auction proposals raised in this rulemaking in a manner consistent with the views expressed herein.

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CERTIFICATE OF SERVICE

I, Jane Aguilard, do hereby certify that on this 20th day of November, 1997, I caused the foregoing "Reply Comments of Comtrak" to be served via hand delivery to the following:

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